

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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APR -5 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0386-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
ALAN WADE CROWE,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091286001

Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Stanton Bloom, P.C.
By Stanton Bloom

Tucson
Attorney for Petitioner

B R A M M E R , Presiding Judge.

¶1 Petitioner Alan Crowe was driving his car while under the influence of alcohol and collided with two vehicles, severely injuring the driver of one of the vehicles and injuring that victim's passengers—his wife and his seventeen-year-old daughter— as

well as the driver of the second vehicle. Crowe was charged in an amended indictment with eight counts of aggravated assault, dangerous offenses, one count of criminal damage, and three counts related to driving while under the influence of alcohol (DUI), including one count of extreme DUI for having a blood alcohol concentration (BAC), of .15 or more, based on a BAC of .183 at the time of the accident. Pursuant to a plea agreement, Crowe was convicted of two amended counts of aggravated assault, non-dangerous offenses, and DUI with an alcohol concentration of .08 or greater and one prior DUI conviction. The trial court sentenced him to the seven-year, maximum prison term on one of the aggravated assault counts, *see* A.R.S. § 13-702, followed by concurrent, five-year terms of probation on the remaining counts. Crowe sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., challenging the prison term and raising related claims of ineffective assistance of counsel. The trial court denied relief without an evidentiary hearing, and this petition for review followed. We will not disturb the court's ruling unless it clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In its minute entry denying relief, the trial court identified the claims Crowe had raised, addressed the claims thoroughly and, specifying the relevant case and statutory authority, found Crowe had failed to raise a colorable claim for relief. The court rejected Crowe's claims, finding the prison term appropriate notwithstanding Crowe's challenges. No purpose would be served by reiterating the court's ruling in its entirety here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Rather, because the court's ruling is correct, based on the record before us and the

applicable law, we adopt it. However, in light of the arguments Crowe has made in his petition for review, we specify further the basis for our conclusion that he has not sustained his burden of establishing the court abused its discretion.

¶3 In addition to the grounds the trial court specified for denying post-conviction relief, we note that at the change-of-plea hearing, the court had questioned Crowe about the offenses of conviction and the potential prison terms he might receive. Crowe acknowledged he understood that, as the plea agreement provided, the high end of the sentencing range for aggravated assault was a substantially aggravated prison term of eight years and nine months.

¶4 Nor has Crowe persuaded us the trial court erred when it rejected the claims related to his lack of notice that the court had intended to impose what Crowe refers to as an “aggravated” prison term. The Arizona criminal sentencing code was amended in 2008 and renumbered, *see* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120, effective “from and after December 31, 2008,” *id.* § 120. We have examined Crowe’s claims based on the version of the sentencing statutes as worded and numbered at the time he committed the offenses, which was April 2008. *See* 2006 Ariz. Sess. Laws, ch. 148, §§ 1, 2 (A.R.S. §§ 13-702, 13-702.01). The sentencing range for Crowe’s offense remained the same. In the current version of the statute the sentencing ranges, including the substantially mitigated and aggravated terms, are set forth in subsection (D). But in the former version, the statutory ranges, including the minimum and maximum terms, were set forth in subsection (A), the aggravating circumstances were set forth in subsection (C), the mitigating circumstances were in subsection (D), and the substantially mitigated and

aggravated terms were based on the application of former A.R.S. § 13-702.01, which was repealed in 2008. 2008 Ariz. Sess. Laws, ch. 301, § 25.

¶5 In its order denying Crowe’s Rule 32 petition, the trial court appears to have relied on the former version of the statute for the sentencing ranges, referring to § 13-702(A), but also to have considered the implications of current § 13-702(E), which requires the sentencing court to “inform all of the parties before sentencing occurs of its intent to increase or decrease a sentence to the aggravated or mitigated sentence pursuant this section,” and provides that a party who does not receive such notice waives the right to notice by failing to object at sentencing. The result here is the same, however, given that the court imposed the “maximum,” rather than the “aggravated,” prison term and former § 13-702.01(I) contained essentially the same notice requirement before a “substantially aggravated” prison term could be imposed.

¶6 Even though the trial court misspoke at the sentencing hearing when it characterized the seven-year term, which was the “maximum” term under the statute, as an “aggravated” term, the court correctly rejected Crowe’s claims that were based on that error, including the related claim of ineffective assistance of counsel. Crowe had not been entitled to specific notice that an aggravated term was to be imposed and, as the court made clear, counsel’s performance in this regard could not have been prejudicial because the outcome would have been the same. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (to be entitled to relief based on claim of ineffective assistance of counsel, defendant must show counsel’s performance both deficient and prejudicial); *see also State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) (failure to prove

either element of Strickland test fatal to ineffective assistance of counsel claim). Crowe's reliance on *State v. Gatliff*, 209 Ariz. 362, 102 P.3d 981 (App. 2004), is misplaced. It does not support his contention that he had been entitled to notice pursuant to former § 13-702.01(I). Rather, that case confirmed the general proposition that for purposes of *Blakely v. Washington*, 542 U.S. 296 (2004), and the jury-trial rights it established, a sentence that is greater than the presumptive is one that exceeds the “statutory maximum [and] must be submitted to a jury, and proved beyond a reasonable doubt.” *Gatliff*, 209 Ariz. 362, ¶ 10, 102 P.3d at 983, quoting *Blakely*, 542 U.S. at 301.

¶7 We note, too, that the trial court correctly rejected Crowe's contention it had erred by failing to consider certain evidence in mitigation. In its minute entry denying post-conviction relief, the court made clear it had, in fact, considered the mitigating evidence before it. Based on Crowe's arguments below and on review, he appears not to appreciate the distinction between a court's obligation to consider relevant evidence, including the mitigating evidence, and its discretion to decide whether a factor constitutes a mitigating circumstance. A court generally will be regarded as having exercised its broad sentencing discretion soundly so long as it considers the relevant evidence before it, including any in mitigation; it is within the court's discretion to determine how much weight to give those factors. See *State v. Cazares*, 205 Ariz. 425, ¶¶ 6, 8, 72 P.3d 355, 357 (App. 2003). The court is required only to consider the evidence; “it need not find the evidence [constitutes a] mitigating [circumstance].” *State v. Long*, 207 Ariz. 140, ¶ 41, 83 P.3d 618, 626 (App. 2004). And we will presume the court considered the evidence presented. See *State v. Everhart*, 169 Ariz. 404, 407, 819

P.2d 990, 993 (App. 1991). The court fulfilled its duty here and did not abuse its discretion when it initially imposed the sentence or when it confirmed the propriety of the prison term after considering Crowe's arguments in this post-conviction proceeding and denying the Rule 32 petition without an evidentiary hearing.

¶8 Because Crowe has not sustained his burden of establishing the trial court abused its discretion, we adopt its ruling. Although we grant the petition for review, we deny Crowe's request for relief.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge